

December 11, 2013

Brandt Grotte
San Mateo City Council
330 West 20th Avenue
San Mateo, California 94403

Re: Your Request for Advice
Our File No. A-13-144

Dear Mr. Grotte:

This letter responds to your request for advice regarding the campaign provisions of the Political Reform Act (the "Act").¹

QUESTION

Upon leaving office as a San Mateo City Council member may you transfer surplus funds in your candidate controlled committee to a legal defense fund to be used to defend your interests in legal proceedings against the City Council when you are not specifically named in the lawsuit, but have been named in related discovery requests?

CONCLUSION

Yes, you may transfer the surplus funds in your candidate controlled committee to a legal defense fund to be used to defend your interests in legal proceedings against the City Council when you are not specifically named in the lawsuit and have been named in related discovery requests.

FACTS

You are a current member of the City Council for the City of San Mateo. You have served as a city council member for the past eight years, and your term will expire on December 2, 2013. You are not seeking reelection, and will be leaving office when your term expires. You currently have a candidate controlled committee with \$10,305 on hand.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

In January 2013, the San Mateo City Council conducted a public hearing on the application of the city's zoning code to a property on which a new 7-Eleven store had been constructed. At the conclusion of this hearing, the San Mateo City Council unanimously decided that the operation of a 7-Eleven store on this property violates the City's zoning code. The City of San Mateo has filed a lawsuit against the property owner and 7-Eleven seeking a court order to permanently close the store.

7-Eleven and the property owner have each filed countersuits alleging the City of San Mateo has violated their property rights as a result of the city council's decision. In addition, each party has filed a petition for writ of mandate asking the court to overturn the city council's decision. Finally, 7-Eleven has filed a complaint against the City of San Mateo alleging that the members of the city council and the planning commission violated the Brown Act during the administrative hearing process on the zoning question. These lawsuits name the city council as a party, but do not name individual members of the city council as defendants.

The parties have also initiated discovery to obtain access to information in the possession of the City of San Mateo, in your possession, and on your work computer at your place of employment. The City of San Mateo has opposed these efforts, and it is possible that discovery motions may be filed to compel the production of this information. In these discovery actions you are specifically named. You would like to know if you may place your surplus campaign funds into a legal defense fund to defend your interests in the legal proceedings relating to the 7-Eleven land use matter.

ANALYSIS

Section 89519 allows surplus funds to be used for attorney fees for litigation that arises directly out of an elected officer's activities as an elected officer.

Section 85304.5 provides for the establishment of a legal defense fund for local candidates and elected officeholders. Section 85304.5 states:

“(a) A candidate for elective office other than an elective state office or an elected officer other than an elected state officer may establish a separate account pursuant to subdivision (a) of Section 85304 and may use these funds only to defray attorney's fees and other related legal costs.

“(b) A candidate for an elective office other than an elective state office may receive contributions to the separate account subject to any limitations provided by local ordinance. However, all contributions to these separate accounts shall be reported in a manner prescribed by the commission.

“(c) Once the legal dispute is resolved, the candidate or elected officer shall dispose of any funds remaining in the separate accounts after all expenses associated with the dispute are discharged for one or more of the purposes set forth in paragraphs (1) to (5), inclusive, of subdivision (b) of Section 89519.”

Regulation 18530.45 identifies what procedures must be used in establishing a legal defense fund and states that legal defense funds may not be raised in connection with a civil proceeding until a private person files the civil action. (Regulation 18530.45(i)(3)(B)).²

Regulation 18530.45(i)(1)(B)(2) further states that “[a] candidate or officer may only raise funds under this regulation for defense against a civil or criminal proceeding, or for defense against a government agency’s administrative enforcement proceeding arising directly out of the conduct of an election campaign, the electoral process, or the performance of the officer’s governmental activities and duties”

In the matter you have described the property owner and 7-Eleven have filed suit against the city and the council, but have not named you specifically. You have indicated that the legal proceedings surrounding the 7-Eleven issue arise directly out of the performance of your governmental activities and duties, as required for application of Section 85304.5. There are also discovery requests that name you specifically. Under these circumstances the action has been brought against you in your official capacity and therefore you may open a legal defense fund.

Regulation 18530.45 further details the reporting requirements for “legal defense funds” raised under Section 85304.5, requiring that the candidate open a controlled committee to administer a bank account, separate from any other bank account held by the candidate, established specifically for the deposit of these funds.

Although “legal defense funds” are raised, deposited, and reported under rules that differ somewhat from corresponding provisions governing campaign funds generally, monies raised and spent by a candidate under Section 85304.5 *are* campaign funds, and as such are subject to the “personal use” limitations on expenditures of campaign funds.

We therefore conclude that you may properly establish a legal defense fund committee and associated bank account and transfer your surplus campaign funds into it, for the purpose of defending the litigation you have described, in accordance with the rules outlined in this letter.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Sukhi K. Brar
Counsel, Legal Division

SKB:jgl

² Please be aware that the regulation permits a local government agency to impose different requirements than those established by the Act and its regulations so long as they are “at least as strict” as those imposed by the regulation. We do not address local requirements, if any, in this response.